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LE TRUONG VINH v. PP

HIGH COURT MALAYA, JOHOR BAHRU
COLLIN LAWRENCE SEQUERAH J
[CRIMINAL APPEAL NO: MT 42S-25-11-2016]
1 JUNE 2017

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CRIMINAL LAW: *Fisheries Act 1985 – Section 16(3) – Conviction and sentence – Appeal against – Use of uncertified court interpreter – Whether accused properly understood nature of charge and consequences of pleading guilty – Whether accused unreservedly pleaded guilty to charge – Whether charge defective – Sentence – Whether manifestly excessive – Public interest elements – Consideration of – Whether plea of guilt entitled accused to discount in sentence*

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CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Offence under s. 16(3) Fisheries Act 1985 – Use of uncertified court interpreter – Whether accused properly understood nature of charge and consequences of pleading guilty – Whether accused unreservedly pleaded guilty to charge – Whether charge defective – Sentence – Whether manifestly excessive – Public interest elements – Consideration of – Whether plea of guilt entitled accused to discount in sentence*

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The appellant, a Vietnamese national, was charged under s. 16(3) of the Fisheries Act 1985 ('the Act') for failing to notify by radio, telex or facsimile an authorised officer of the name, location and route of the vessel, the types and amount of fish it was carrying and the circumstances under which it was entering Malaysian waters. The appellant pleaded guilty and was sentenced to a fine of RM1,000,000 in default eight months' imprisonment and the vessel was thus seized and ordered to be forfeited under s. 34 of the Act. The appellant, however, alleged that the charge was defective due mainly to the use of an uncertified court interpreter, where a doubt arose whether the appellant had properly understood the nature and consequences of his plea when he pleaded guilty to the charge.

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Held (dismissing appeal; affirming conviction and sentence):

(1) Upon a perusal of the notes of evidence in the supplementary record, it transpired that the Vietnamese interpreter was brought along by the prosecution. The Sessions Court Judge ('SCJ') had directed the interpreter to ask the appellant whether he agreed to him acting as an interpreter. It was recorded that the appellant had no objection and agreed to Encik Azahari acting as interpreter. It was then recorded that the charge was read to the appellant through the interpreter after which it was recorded that the appellant understood the charge read out to him in Vietnamese and pleaded guilty and understood the nature and consequences of such a plea. (paras 14-17)

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(2) The interpreter, had in accordance with what was required in the case of *Fong Hong Sium v. PP*, talked for a few moments with the accused and enquire whether they understood one another to the satisfaction of the

appellant. In all the circumstances, the appellant was made to understand that the consequences of his plea of guilt could have led to a fine of RM1 million and the possibility that the vessel could be forfeited. This court was satisfied that the appellant had understood the nature and consequences of his plea and had pleaded guilty to the charge unreservedly. (paras 30, 35 & 41)

(3) In respect of the sentence passed by the SCJ, she considered public interest to be the most important factor and subordinate to the interests of the appellant. The public interest element here was the fact that there was a rise in the registration of cases in our courts involving foreign vessels committing offences in Malaysian waters. The SCJ was well justified in taking judicial notice of the incidence of these statistics. The seriousness of the offence coupled with the public interest element of protecting the environment or the ecosystem and the livelihood of our local fishermen meant that this was an appropriate case to depart from the general rule that a plea of guilty entitled the appellant to a discount in sentence. Therefore, SCJ saw fit to impose the maximum fine. There was no flaw in her sentencing nor had she erred in principle. These reasons also justified her exercising her discretion to forfeit the vessel. The sentence passed was not harsh or manifestly excessive. (paras 44, 47 & 49)

Case(s) referred to:
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Fong Hong Sium v. PP [1950] 1 LNS 17 HC ***(refd)***
Huang Chin Shiu v. Rex [1952] 1 LNS 166 ***(refd)***
Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1985] 1 LNS 122 SC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 305
Evidence Act 1950, s. 57
Fisheries Act 1985, ss. 16(3), 34
Oaths And Affirmations Act 1949, s. 6

For the appellant - Juanita Mohd Said; DPP
For the respondent - GK Sritharan; M/s GK Sritharan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Collin Lawrence Sequerah J:

Introduction

[1] This is an appeal from the decision of the Sessions Court at Kota Tinggi where the appellant was charged under s. 16(3) of the Fisheries Act 1985 (Act 317) ("the Act").

[2] The charge read as follows:

> Bahawa kamu sebagai Nakhoda vessel penangkapan ikan asing KG 90457 TS pada 11 Oktober 2016 jam lebih kurang 2.11 tengahari di atas vessel penangkapan ikan asing KG 90457 TS di kedudukan garis lintang 01 43.043 minit utara dan garis bujur 104 29.886 minit timur lebih kurang 26 batu nautika dari tenggara Tanjung Sedili, dalam daerah Kota Tinggi di dalam negeri Johor, di dalam perairan perikanan Malaysia didapati telah memasuki perairan perikanan Malaysia tanpa memberitahu seorang pegawai berkuasa melalui radio, teleks, atau faksimili dalam Bahasa Inggeris atau Melayu tentang nama, negara bendera, lokasi, jalan dan destinasi KG 90457 TS, jenis dan amaun ikan yang dibawanya dan tentang hal keadaannya KG 90457 TS memasuki perairan perikanan Malaysia. Oleh sebab itu, kamu telah melakukan suatu kesalahan di bawah seksyen 16(3) Akta Perikanan 1985.

[3] The sentence prescribed following a conviction under the section is as follows:

> Seksyen 25(a) Akta Perikanan 1985, apabila sabit kesalahan, jika vessel yang berkenaan itu ialah vessel penangkapan ikan asing atau orang yang berkenaan itu ialah rakyat negara asing, dikenakan denda tidak melebihi sejuta ringgit setiap orang dalam hal empunya atau nakhoda, dan seratus ribu ringgit dalam hal tiap-tiap anggota kru.

[4] Under s. 34, the court may also order forfeiture of the seized vessel in certain circumstances.

[5] After the charge was read out, the appellant who is a Vietnamese national and unrepresented at the time, pleaded guilty on 23 October 2016 and was sentenced to a fine of RM1,000,000 in default imprisonment for eight months and the vessel Registration No. KG 90457 TS which was seized, was ordered to be forfeited under s. 34 of the Act.

The Appeal

[6] Several grounds of appeal were raised in the petition of appeal before this court. Although the appellant had pleaded guilty to the charge, it was alleged that the charge was defective, the appellant was charged under the wrong section and that the charge did not set out the punishment section.

[7] However, the main ground of appeal was that because of the use of an uncertified court interpreter, there is doubt whether the appellant had properly understood the nature and consequences of his plea when he pleaded guilty to the charge. The appellant's plea was therefore said to be defective.

Analysis And Decision

[8] Learned counsel for the appellant submitted that the notes of evidence in the Sessions Court contain no indication as to the credentials of the interpreter.

[9] Upon perusing the notes of evidence in the record of appeal, I found it to be somewhat sketchy and perhaps not fully reflective of what transpired during the proceedings at the Sessions Court. All the notes of evidence indicated were that the interpreter was one Azahari bin Abdul Talib who was stated to have had his origins in Vietnam. Other than that, there was no indication as to his credentials or ability to speak and interpret in the Vietnamese language. It is not in dispute that En Azahari is not a certified court interpreter.

[10] Thereafter, the notes indicate that the charge was read out, explained and that the appellant understood what was explained to him in the Vietnamese language. After that, it is recorded that the court noted that the appellant had no objection and agreed that the said En Azahari act as interpreter in this case.

[11] The notes then indicate that the appellant still unconditionally maintained his guilty plea after the court directed that the charge be read several times to the appellant by the said En Azahari. After that, the notes indicated that the facts of the case were read to the appellant and several exhibits tendered before he mitigated and was sentenced.

[12] Not being satisfied with state of the notes of the evidence before this court, I directed that if there was a more comprehensive transcript of the proceedings at the court below available, that they be obtained soonest possible so as to satisfy this court whether the appellant had fully understood the nature and consequences of his plea of guilty. I then adjourned the proceedings to another date.

[13] When the case was called up again on the next date, a more comprehensive transcript of the notes of evidence was duly obtained and filed before this court as a supplementary record of appeal (vol. 1a) ("supplementary record"). Learned counsel indicated that he did not require the viewing of the court proceedings as recorded in the compact disc.

[14] Upon a perusal of the notes of evidence in the said supplementary record, it transpired that the Vietnamese interpreter was brought along by the prosecution.

[15] What follows from the notes is the Sessions Court Judge ("SCJ") directing the interpreter to ask the appellant whether he agreed to him acting as interpreter and if he did not, the court would make a request for an interpreter but that this would take some time.

[16] It is then recorded that the appellant had no objection and agreed to the said En Azahari acting as interpreter ("hereinafter referred to as the interpreter"). It is recorded at the outset that the interpreter has his origins from Vietnam followed by the words, "sumpah dan keterangan dalam bahasa Melayu".

[17] It is then recorded that the charge is read to the appellant through the interpreter after which it is recorded that the appellant understood the charge read out to him in Vietnamese and pleaded guilty and understands the nature and consequences of such a plea.

[18] What follows then is a record that the appellant was asked more than once whether he understood the charge and still wanted to maintain his plea of guilty. At one point, the appellant was asked how long he needed to think about the plea indicating some hesitance on his part.

[19] However, it is finally recorded that he understood the charge and consequences of sentencing after which it is again recorded that the appellant pleaded guilty and understood the nature and consequences of his plea.

[20] The main contention raised by learned counsel for the appellant was that the trial judge had merely assumed that the interpretation was accurate. It was contended that the said interpreter ought to have taken the stand and taken the oath to truly interpret the charge to the appellant. It was submitted that there was no record of this being done.

[21] The issue to be determined therefore is whether or not the appellant had truly understood the charge and the nature and consequences of pleading guilty and had unreservedly pleaded guilty to the charge.

[22] In *Fong Hong Sium v. PP* [1950] 1 LNS 17; [1950] 1 MLJ 293, the appellant, who was a Hainanese, was tried in the Sessions Court. In the absence of a court interpreter able to speak Hainanese, the chief clerk of the High Court assisted the Sessions Court as interpreter. He was not a sworn interpreter, and was not sworn in as a special interpreter for the purpose of the case.

[23] He spoke in Hokkien, in which he is fluent, and he said that the appellant also spoke, and is fluent, in Hokkien. He added that he did not himself speak Hainanese and that he did not know why a Hainanese interpreter was not obtained. He was cross-examined by the appellant, and admitted that the appellant's Hokkien was "poor". In answer to the court, he also said that he had not told the court below that the appellant had spoken first in Hainanese and then in Hokkien.

[24] The court held:

> *It is the duty of the Court to find an interpreter for the language required, and the Court must be satisfied that the interpreter is competent to do his work efficiently. If the interpreter is an official interpreter of a Court, or a certified interpreter in the employment of any Government in the Federation, and if he is "engaged in the performance of his duties", then by virtue of section 4(2) of the Oaths and Affirmations Ordinance, 1949, it is not necessary to swear the interpreter. In any other case, however, it is a statutory requirement that he should be sworn (see section 4(1) (b) of the Ordinance).* Even though he is interpreting in a language in which he is not officially qualified, a Court interpreter will be "engaged in the performance of his duties", since it is the duty of such interpreters

> to do the work of interpretation in all languages in which they are competent to interpret, notwithstanding the lack of an official qualification. It is a general rule of practice that, unless the interpreter is officially qualified in the language, the Court should ascertain that he can understand, and be understood by the accused with sufficient ease to enable the proceedings to be properly conducted. **The most convenient method is to allow him to talk for a few moments with the accused and to enquire whether they can so understand one another**. When the Court is satisfied of this, it should be incorporated in the record before the evidence is recorded. There are, of course, cases when this would be quite unnecessary, for example, if both the accused and interpreter are Siamese and are speaking Siamese and the interpreter is fluent in English. *When, either by reason of the interpreter being officially qualified or in such manner as is described above, it is established that the interpreter is competent to do his work as such, he must then, unless exempted under the provisions of section 4(2) of the Ordinance, be sworn, and an omission to do this is an illegality. As the interpreter in this case was not an official Court interpreter, or a certified interpreter in the employment of Government, the omission to swear him was an incurable defect, and it was on this ground that I was obliged to allow the appeal and set aside the conviction and sentence*. If the interpreter had sworn to his ability to understand and be understood by the appellant, and had been duly sworn as Interpreter, the appellant would have found it very difficult to persuade me that he was not adequately interpreted.
>
> (emphasis added)

[25] Learned counsel for the appellant submitted that the notes in the supplementary bundle do not reflect that the interpreter actually took the oath to interpret in the Vietnamese language. It is not in dispute that the interpreter here was not an official court interpreter or a certified interpreter in the employment of the Government. This being the case, he was not exempted from being sworn in.

[26] Upon perusing the transcript in the supplementary bundle, there is a record of this having been done here. The notes in the supplementary bundle contain the phrase "sumpah dan keterangan dalam bahasa Melayu". This meant that the interpreter duly took the oath to act as interpreter in the Vietnamese language. It is evident that what the notes reflect is that he took the oath to do so in Bahasa Malaysia. The notes do not make any sense if it were construed in any other way. Under the circumstances, there had been compliance with s. 6 of the Oaths And Affirmations Act 1949 (Act 194).

[27] In *Huang Chin Shiu v. Rex* [1952] 1 LNS 166; [1952] MLJ 7, it was held:

> It is the duty of an interpreter not only to make sure that he and the accused understand one another but also to inform the Court if there is any difference of language between them which might cause difficulty; and it is the duty of Magistrates to ensure, as a matter of routine, that this is always done.

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> ... It is to my mind essential to the validity of a plea of guilty that the accused should fully understand what he is pleading to; and it is impossible to be sure that he has understood, unless the charge has been explained to him in a language with which he is entirely conversant

[28] The above passage in the judgment make it clear that it is important
B to ensure that the accused understands fully the charge against him before a plea of guilty can be safely accepted. Learned counsel submitted that in accordance with the requirement in *Fong Hong Sium v. Public Prosecutor (supra)*, there is no record of the interpreter and the accused talking for a few moments so as to enquire whether they could understand one another.

C **[29]** However, in the transcript contained in the supplementary record of appeal, these words are recorded "arahkan jurubahasa bertanya sama ada OKT setuju atau tidak setuju beliau menjadi jurubahasa dalam kes ini …". Common sense would dictate therefore that some preliminary conversation had taken place between the interpreter and the appellant. The interpreter
D would have obviously conversed with the appellant to ascertain his ability to understand him in the Vietnamese language. This would of course not be recorded *verbatim* at all in the transcript as it would have been in the Vietnamese language.

[30] Otherwise, it would not have been possible for the interpreter to
E ascertain whether the appellant had understood and had consented to him interpreting the proceedings to the court. I find that the interpreter did therefore in accordance with what was required in *Fong Hong Sium v. Public Prosecutor (supra)*, talk for a few moments with the accused and enquire whether they understood one another to the satisfaction of the appellant.

F **[31]** Learned counsel for the appellant also raised the issue that s. 34 of the Act relating to forfeiture of the vessel was not reflected in the notes of evidence as having been explained. While this was the case with respect to the first set of the notes, the notes of evidence contained in the supplementary bundle clearly reflected that s. 34 was mentioned and clearly explained to
G the appellant.

[32] The following excerpt from the notes of evidence in the supplementary bundle confirms this:

> Mahkamah: Terdapat kesilapan dalam peruntukan hukuman dalam kertas
H pertuduhan.
>
> TPR: Pohon pindaan lisan dibuat.
>
> Mahkamah: Benarkan.
>
> Mahkamah: Peruntukan seksyen 34 memang ada?
>
I TPR: Ada
>
> Mahkamah: Sudah terangkan tadi kapal boleh dilucutkan?
>
> Jurubahasa: Sudah.

[33] Learned counsel also submitted that the word "boleh" in the question "Sudah terangkan tadi kapal boleh dilucutkan?" above was wrong as it gave the impression that the vessel only may have been forfeited as opposed to the mandatory connotation of the phrase "wajib". A perusal however of s. 34 of the Fisheries Act 1985 (Act 317) indicates otherwise. The said section reads:

> 34. Court may order forfeiture of seized vessel, etc., in certain circumstances
>
> Where it is proved to the satisfaction of a court that any vessel, vehicle, article or thing seized under this Act was the subject-matter of, or was used in the commission of, an offence under this Act, **the court may order the forfeiture of such vessel**, vehicle, article or thing notwithstanding that no person may have been found guilty of such offence.
>
> (emphasis added)

[34] The provision to forfeit the vessel is therefore not mandatory. The contention of learned counsel is therefore with respect flawed. This is fortified by the following excerpt from the said notes in the supplementary bundle as follows:

> Mahkamah: OKT faham denda boleh sampai RM1 juta ringgit dan kapal boleh di lucuthak. OKT faham ke tidak dan masih mengaku salah atau tidak? Tidak mahu selepas ini kata tidak faham.

[35] In all the circumstances therefore, I find that the appellant was made to understand that the consequences of his plea of guilty could have led to a fine of RM1 million and the possibility that the vessel could be forfeited.

[36] I agree with the contention of the learned Deputy Public Prosecutor (DPP) that looking at the notes as a whole, it cannot be said that the appellant had suffered any prejudice. A perusal of the notes also indicates that there were numerous occasions when the court had asked the interpreter to explain the consequences of a plea of guilty.

[37] The notes also reflected the following:

> Mahkamah: Masih mengaku salah atau tidak? Kalau tidak mengaku, saya tidak paksa. Cakap sahaja tidak mengaku.
>
> Jurubahasa Mahkamah: Macam mana encik?
>
> Jurubahasa: OKT tengah fikir hendak mengaku atau tidak.
>
> Mahkamah: Berapa lama hendak fikir?

[38] The above exchange reflects that the process took some time and was carefully done. I agree with the submission of the DPP that the notes reflect the contemporaneous and simultaneous interpretation as the proceedings unfolded. The notes would not, as learned counsel seemed to suggest, show that the interpreter had explained in Vietnamese what was being said to the appellant. This was rather self-evident as he had already taken the oath to interpret in Vietnamese.

[39] The hesitancy of the appellant as reflected in the excerpt from the notes "OKT tengah fikir hendak mengaku atau tidak", indicated that he was aware of the consequences of his plea and was actively pondering his fate before committing himself.

[40] The following concluding part of the said notes would also indicate that the appellant had understood the nature and consequences of his plea.

> Mahkamah: Berapa lama hendak fikir?
>
> Jurubahasa Mahkamah: Minta tolong yang duduk di belakang itu senyap.
>
> Mahkamah: Sekali lagi saya tanya, OKT faham pertuduhan ke tidak?
>
> Jurubahasa: OKT faham.
>
> Mahkamah: OKT faham hukuman atau tidak?
>
> Jurubahasa: OKT faham.
>
> Mahkamah: Jawapan paling penting. Mengaku atau tidak?
>
> Jurubahasa: OKT mengaku.
>
> Mahkamah: Mengaku? Betul?
>
> Mahkamah: Tuduhan dibacakan, diterangkan, tertuduh faham dalam Bahasa Vietnam. Mengaku salah. Faham sebab dan akibat pengakuan tanpa syarat.
>
> Saya rasa saya dah tanya lebih tiga kali. Jangan lepas ini kata mahkamah tidak terangkan.
>
> Mahkamah: OKT masih mengekalkan pengakuan salah tanpa syarat setelah pertuduhan dibacakan beberapa kali oleh jurubahasa atas arahan mahkamah.

[41] Construed as a whole therefore, I am satisfied from the transcript in the supplementary bundle that the appellant had understood the nature and consequences of his plea and had pleaded guilty to the charge unreservedly. This being the case, all that is left to be considered is the issue of sentence. See s. 305 of the Criminal Procedure Code which reads as follows:

> Section 305
>
> When plea of guilty limited right of appeal
>
> When an accused person has pleaded guilty and been convicted by a Magistrate on that plea, there shall be no appeal except as to the extent or legality of the sentence.

[42] The other grounds of appeal raised need not therefore be considered.

Sentence

[43] In respect of the sentence passed by the learned Sessions Court Judge (SCJ), her grounds of judgment reflected that she considered the public interest to be the most important factor and subordinate to the interests of the appellant. The SCJ had rightfully placed the public interest as the foremost consideration. See *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256.

[44] The public interest element here was the fact that there was a rise in the registration of cases in our courts involving foreign vessels committing offences in Malaysian waters. The SCJ was well justified in taking judicial notice of the incidence of these statistics. The categories of judicial notice are not exhaustive and confined to the matters enumerated in s. 57 of the Evidence Act 1950. See *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* [1985] 1 LNS 122; [1986] 2 MLJ 30.

[45] The learned SCJ also properly recognised the seriousness of the Legislature in combating a menace of this kind when they saw fit to impose a maximum fine of RM1,000,000 upon the master of the vessel. This consideration is no less reflective of a public interest element.

[46] The other public interest element taken into consideration was the fact that from the photographs tendered, the crew of the said vessel were obviously engaged in fishing in Malaysian waters. The SCJ correctly recognised that such activity if undeterred would result in the encroachment on the catch from our seas by local fishermen and would impact on their livelihood. The learned SCJ further considered the damage occasioned to the environment as a result of such activity.

[47] The seriousness of the offence coupled with the public interest element of protecting the environment or the ecosystem and the livelihood of our local fishermen meant that this was an appropriate case to depart from the general rule that a plea of guilty entitles the appellant to a discount in sentence.

[48] Under all the circumstances, she therefore saw fit to impose the maximum fine. I find no flaw in her sentencing nor had she erred in principle. The SCJ had given adequate reasons for the sentence imposed and had correctly taken into account the foremost consideration of the public interest. I find also that these reasons also justified her in exercising her discretion to forfeit the vessel.

[49] Although not explicitly stated, it is evident that her decision to forfeit the vessel was because of the reasons given in the preceding passages in her grounds of judgment. This was an exercise of her discretion and as long as the sentence was not harsh or manifestly excessive, it ought not to be interfered with. See *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83. Under the circumstances, I do not find the sentence passed to be harsh or manifestly excessive.

[50] I therefore dismiss the appeal. The conviction and sentence passed by the Sessions Court are hereby affirmed.